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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT DAVID COX,

Defendant and Appellant.

B290323

(Los Angeles County  
Super. Ct. No. LA087048)

**THE COURT:**

Defendant and appellant Robert David Cox appeals his burglary conviction. His appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), raising no issues. On November 14, 2018, we notified defendant of his counsel's brief and gave him leave to file, within 30 days, his own brief or letter stating any grounds or argument he might wish to have considered. That time elapsed, and defendant submitted no brief or letter. On January 3, 2019, we requested the parties to submit letter briefs regarding the effect of Senate Bill No. 1393 (Stats. 2018, ch. 1013). Both parties agree that the matter should

be remanded to permit the trial court to exercise discretion under that statute. Finding no other arguable issues, we affirm the judgment and remand with directions.

In an amended information, defendant was charged with one count of first degree burglary with a person present, in violation of Penal Code section 459.<sup>1</sup> It was also alleged pursuant to section 667, subdivision (a)(1) that defendant had suffered a prior serious felony in 2005, a violation of section 459. The same prior conviction was alleged pursuant to the “Three Strikes” law, sections 667, subdivisions (b) through (j) and 1170.12. In addition, a single prison prior enhancement pursuant to section 667.5, was alleged.

The evidence showed that a person entered a locked garage attached to an occupied house on the night of March 6, 2015, stole various items from the vehicle parked inside, and opened cabinets in the garage. A clean-looking partially smoked cigarette was found on the garage floor. The cigarette was not there the preceding day, neither of the two residents of the house smoked, and no visitors who smoked had been inside the garage. An expert testified that the DNA profile obtained from the filter of the cigarette matched defendant’s DNA profile.

A jury convicted defendant of the offense as charged, and found true the allegation that a person was present. After a court trial on the prior-conviction allegations, the trial court found the prior 2004 burglary conviction to be true. The court exercised its discretion to strike the allegation under section 667.5, and denied a motion under *Romero*<sup>2</sup> to strike the burglary prior alleged under the Three Strikes law. On April 26, 2018, the

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

trial court sentenced defendant to a total prison term of nine years, comprised of the low term of two years, doubled as a second strike to four years, plus a five-year recidivist enhancement pursuant to section 667, subdivision (a)(1). The court calculated presentence custody credit as 193 actual days and 29 days of conduct credit, for a total of 222 days. The court ordered mandatory fines and fees, and reserved jurisdiction regarding restitution. Defendant filed a timely notice of appeal from the judgment.

Effective January 1, 2019, under the recently enacted amendments to sections 667, subdivision (a)(1), and 1385, subdivision (b), trial courts have discretion to strike sentencing enhancements for prior serious felony convictions in the interest of justice. (Stats. 2018, ch. 1013, § 2.) The parties agree that the statute applies to defendant under the rule of *In re Estrada* (1965) 63 Cal.2d 740, 744-745. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Remand is required in cases such as this where the sentencing record does not indicate that the trial court “would not, in any event, have exercised its discretion to strike the [sentence enhancement]. [Citation.]” (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 530, fn. 13 (amended Three-Strikes law); see also *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080-1081 [amended firearm enhancement statute].)

We have examined the entire record and are satisfied that defendant’s appellate counsel has fully complied with his responsibilities and that no other arguable issue exists. We conclude that defendant has, by virtue of counsel’s compliance with the *Wende* procedure and our review of the record, received adequate and effective appellate review of the judgment entered against him in this case. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 123-124.)

## **DISPOSITION**

The judgment of conviction is affirmed. The matter is remanded for the trial court to exercise its discretion whether or not to strike the enhancement imposed under section 667, subdivision (a)(1). If the court elects to exercise this discretion, the defendant shall be resentenced and an amended abstract of judgment prepared and forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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LUI, P.J.

ASHMANN-GERST, J.

CHAVEZ, J.